

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,
Plaintiff

v.

Cr. No. 94-21-01ML

EDWARD THOMAS VIEIRA, JR.,
Defendant

and

SIMMONS COLLEGE,
Garnishee

MEMORANDUM AND ORDER

Mary M. Lisi, Chief United States District Judge.

The matter before the Court is the defendant's motion to transfer the Government's postjudgment garnishment proceedings against him to the United States District Court for the District of Maine, where the defendant currently resides. For the reasons set forth herein, the motion to transfer is GRANTED.

Background

On May 12, 1994, the defendant, Edward T. Vieira, Jr. ("Vieira"), pleaded guilty in this Court to mail fraud, money laundering, and medicare fraud. On October 19, 1994, Vieira was sentenced to 54 months incarceration and three years of supervised release. Vieira was ordered to make restitution to the "United States Department of Medicaid"¹ in the amount of \$971,000 and to the "Rhode Island Department of Medicare" in the amount of \$60,000.

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The federal and state agencies charged with the administration of Medicaid and Medicare are the U.S. Department of Health and Human Services and the R.I. Department of Human Services, respectively.

Judgment dated October 27, 1994, page 4 of 5. In addition, the sentencing court ordered the forfeiture of funds from foreign bank accounts up to the amount of \$328,000. In late 1994, funds totaling \$325,057.35 were forfeited. A \$200 special assessment was paid in full on January 12, 1995.

Subsequently, the Government initiated two separate garnishment proceedings against Vieira. The first such proceeding, filed in 1995 while Vieira was still incarcerated, sought a Writ of Garnishment directing Citizen's Trust Company to withhold \$4,865.92 belonging to Vieira. Although Vieira initially filed a written objection in which he requested a hearing and claimed that his property was exempt, he later withdrew his request and agreed to the garnishment.

The second garnishment proceeding was initiated in 2004, after Vieira ceased making restitution payments following the conclusion of his supervised release on March 5, 2001. Vieira did not object or request a hearing on that occasion and the Court directed Vieira's then employer, the University of Hartford, to withhold 25% of Vieira's disposable earnings to be paid toward restitution. After Vieira relocated to Maine in August 2004 and began working for Simmons College in Boston, Massachusetts, he was directed by the United States Attorney to pay a minimum of \$750 per month towards his restitution. Vieira made ten such payments and then reduced his payments to \$200 and, later, to \$150 monthly. Since September 6, 2007, Vieira has made no payments at all. Apart from the initial forfeiture, Vieira has only paid a total of \$17,435.52.

As of July 24, 2009, the total outstanding restitution amount is \$1,009,268.56.

On June 4, 2009, the Government filed an application for writ of continuing garnishment pursuant to Section 3205 of the Federal Debt Collection Procedures Act ("FDCPA"), §§ 3001-3308. Upon issuance of the writ to Simmons College, Vieira was sent a Clerk's Notice of Postjudgment Garnishment that advised him of his right to request a hearing within 20 days of receiving the notice if he believed he did not owe money to the Government or if he wanted to claim that his property was exempt. The notice also stated:

"If you think you live outside the federal judicial district in which the Court is located, you may request, not later than 20 days after you receive this notice, that this garnishment proceeding be transferred by the Court to the Federal judicial district in which you reside."

Vieira timely requested by letter that the garnishment proceedings against him be transferred to the United States District Court for the District of Maine where he has been residing for the past six years.² In support of his request, Vieira submitted an affidavit in which he declared that "[l]itigating the garnishment proceedings in Rhode island would constitute an undue geographic and economic hardship for me." Vieira did not specifically request a hearing or file an objection to the garnishment.

The Government has objected to Vieira's motion on the grounds

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The Government has not disputed that Vieira is a Maine resident.

that, in criminal cases, the right to transfer is "overridden . . . by other applicable collection statutes," Gov.'s Mem. at 6, and that this Court "is in the best position to enforce collection" against a defendant with whom it is familiar. Id. at 7. The Government points out that Vieira was originally sentenced in this jurisdiction and that this Court has already presided over two previous garnishment proceedings against him. According to the Government's memorandum, Vieira has recently retained local counsel who has met with the Government and who has been provided with a form for the assessment of Vieira's financial status. Vieira has filed no further response.

Discussion

(A) Transfer of Proceedings

Generally, a court may transfer proceedings against a defendant to another district "for the convenience of the parties and witnesses and in the interest of justice." Fed. R. Crim. P. 21(b). The decision of whether to transfer the proceedings rests within the discretion of the court. See e.g., United States v. Maldonado - Rivera, 922 F.2d 934, 966 (2d Cir. 1990) (Disposition of a motion to transfer is "vested in the sound discretion of the district court"). In making that determination, a court is required to consider certain relevant facts, including the location of the defendant; location of documents and records; expense to the parties; and location of counsel. United States v. Maldonado - Rivera, 922 F.2d at 966 (applying factors set forth in Platt v.

Minnesota Mining and Manufacturing Co., 360 U.S. 240, 84 S.Ct. 769, 11 L.Ed.2d 674) (1964)). The defendant bears the burden of establishing that a transfer of the proceedings against him is warranted. In re United States, 273 F.3d 380, 388 (3d Cir. 2001) (moving party must demonstrate that "a balancing of proper interests weigh in favor of the transfer").

(B) Debt Collection by the Federal Government

Enactment of the FDCPA was intended "to give the Justice Department uniform Federal procedures - prejudgment remedies and postjudgment remedies - to collect debts owed the United States nationwide." United States v. Mays, 430 F.3d 963, 965 (9th Cir. 2005) (quoting H.R. Rep. No. 103-883, at 81 (1995)). The FDCPA provides the Government with the procedures to enforce both civil and criminal debts owed the United States. See United States v. Mays, 430 F.3d at 966 (Subsequent importation of FDCPA provisions into the Mandatory Victims Restitution Act indicates that "Congress clearly meant to make those procedures available in criminal cases"). According to the statute, the FDCPA sets forth the "exclusive civil procedures for the United States . . . to recover a judgment on . . . an amount that is owing to the United States on account of . . . restitution." 28 U.S.C. §3001(a)(1), 3002(3)(B) (Emphasis added).

The FDCA, however, also provides the following exception:

"To the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claim or judgment to the extent those procedures are inconsistent with this chapter." 28 U.S.C. §

3001(b) .

Subsection 3003(b) of the FDCPA further explains that

"[t]his chapter shall not be construed to curtail or limit the right of the United States under any other Federal law or any State law . . . (2) to collect any fine, penalty, assessment, restitution, or forfeiture arising in a criminal case." 28 U.S.C. § 3003(b)(2).

(C) This Case

The Government in this case filed a an application for writ of garnishment pursuant to Section 3205 of the FDCPA, 28 U.S.C. § 3205. Gov.'s Application 1. Section 3205 of the FDCPA provides that a writ of garnishment may be issued by a court against nonexempt disposable earnings or other nonexempt property of a debtor "in order to satisfy the judgment against the debtor." 28 U.S.C. §3205(a). It also sets forth the proper application procedures with which the Government must comply, including notice to the debtor. 28 U.S.C. § 3205(c).

In addition, Subsection 3004(b)(2) of the FDCPA provides as follows:

"If the debtor so requests, within 20 days after receiving the notice described in section 3101(d) or 3202(b)³, the action or proceeding in which the writ, order, or judgment was issued shall be transferred to the district court for the district in which the debtor resides." 28 U.S.C. § 3004(b)(2) (Emphasis added).

Based on the noted exception to the FDCPA addressed in

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Subsection 3101(d) refers to prejudgment remedies and subsection 3202(b) refers to the enforcement of judgments.

subsections 3001(b) and 3003(b)(2), the Government suggests that, when other federal collection statutes provide a mechanism to collect a debt in a criminal case, the transfer provision of Section 3004(b)(2) should not be read as mandatory. Gov. Obj. at 6. The government relies primarily on an unpublished decision by the District Court of the Western District of Wisconsin, which held that other criminal collection statutes take precedence over the FDCPA. See United States v. Tedder, 2004 W.L. 415270 at *1 (W.D. Wis., Feb. 26, 2004) (holding that granting a transfer of criminal enforcement proceedings pursuant to Section 3004(b)(2) "would be inconsistent with the procedures set out in 18 U.S.C. §§ 3611-15 and would pose a real risk of curtailing or limiting the government's right to collect the fine and forfeiture imposed on defendant as a consequence of his conviction"). The government's reliance on Tedder is misplaced, however, because that case is inapposite.

The procedures in Sections 3611-3615, to which Tedder specifically refers, are post-sentence administration provisions which were amended to complement the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. §§ 3663A-3664. The MVRA made restitution mandatory for offenses against property under Title 18, "including any offense committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), as committed by Vieira. At the same time, the language of Sections 3211-3215, which previously applied only to fines and assessments, was amended to include "restitution" as well. See Historical and Statutory Notes regarding 1996

Amendments. However, the MVRA and Sections 3611-3615 are applicable to sentencing proceedings only "in cases in which the defendant is convicted on or after the effective date of this Act - April 24, 1996." Pub. L. No. 104-132, §211, see Note at 18 U.S.C. § 2248; see also United States v. Elson, 577 F.3d 713, 721 (6th Cir. 2009). Vieira was convicted and sentenced in 1994 and, consequently, the provisions of the MVRA and the related post-sentence administration procedures, as amended in 1996, do not apply to him. By contrast, Tedder, who requested a transfer of criminal forfeiture proceedings while he was still incarcerated, was convicted in 2003.

The Government's suggestion that this Court should adjudicate the garnishment proceedings against a defendant who was sentenced in this jurisdiction has appeal, especially since Vieira's nonspecific assertion of "economic hardship" does not appear particularly compelling. Nevertheless, the language of Section 3004 (b)(2) of the FDCPA is mandatory and, in the absence of any other federal collection statutes applicable in this particular case, the proceedings must be transferred upon Vieira's timely request.

Conclusion

For the reasons set forth above, Vieira's motion to transfer the garnishment proceedings is GRANTED. The case is transferred to the United States District Court for the District of Maine for further proceedings.

SO ORDERED.

Mary M. Lisi

Mary M. Lisi *USDJ*

November 4, 2009